BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001-8002

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DATE: December 16, 1996

CASE NO.: 94-INA-00428

In the Matter of:

NOKI's CAR REPAIR,
Employer,

On Behalf of:

SARKIS KADEHJIAN,
Alien.

Appearance: Eric Avazian, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above named Alien pursuant to § 212 (a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the

Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 8, 1993, Noki's Car Repair ("Employer") filed an application for labor certification to enable Sarkis Kadehjian ("Alien") to fill the position of Automobile Mechanic (AF 23). The job duties for the position are:

> Replace engines, repair and overhaul foreign and domestic cars. Examine vehicle using hydraulic jack or hoist and gain access to mechanical unit bolted to underside of vehicle. Disassemble unit and inspect parts for wear using micrometers, calipers and thickness gauges. Repair and replace parts such as pistons, rods, gears, valves and bearings. Reline brakes.

The sole requirement for the position is four years of experience in the job offered.

The CO issued a Notice of Findings on October 8, 1993 (AF 19-21) proposing to deny certification on the grounds that it appears that U.S. applicant Donald Patterson is qualified for the position and was rejected for other than lawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6) and/or § 656.21(j)(1).

Accordingly, the Employer was notified that it had until November 12, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, submitted under cover letter dated November 2, 1993 (AF 13-18), the Employer contended that U.S. applicant Donald Patterson has a total of one year of experience in automotive mechanic work. The Employer stated that Mr. Patterson is an accomplished machinist and that he, in fact, referred him to another company who hired Mr. Patterson as a

machinist. The Employer further stated that Mr. Patterson has since quit his employment with the other company as he was "overqualified in the type of machining done by this firm and he obtained another position in high precision machining."

The CO issued the Final Determination on November 15, 1993 (AF 9-12), denying certification because: (1) the Employer remains in violation of the regulations at 20 C.F.R. §§ 656.21(b)(6), 656.21(j)(1), and 656.24(b)(ii); (2) the Employer is in violation of ***Unisys***, 87-INA-555 (April 6, 1988) and ***Culver City Nissan***, 90-INA-47 (Oct. 23, 1990); and, (3) the Employer's rebuttal fails to comply with the requirements of the NOF. The CO stated that the Employer's conclusion that the U.S. worker has less than two years of actual on-the-job automobile mechanic repair experience is not substantiated with documentation. Further, the CO noted that the Employer's continued focus on Mr. Patterson's machinist background does not effectively document, specifically, the lawful, job-related reasons for rejecting him at the time of initial referral and consideration and the Employer failed to document that he engaged in good-faith recruitment at the time Mr. Patterson was initially referred for consideration.

On December 20, 1993, the Employer requested review of the denial of labor certification (AF 2-8). The CO denied reconsideration on December 27, 1993, and in May 1994, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a brief on July 22, 1994.

Discussion

An Employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Section 656.24(b)(2)(ii) provides that the CO shall consider a U.S. worker able and qualified for the position if by any combination of education, training, and experience the worker is able to perform the duties involved in a normally accepted manner and as customarily performed by other U.S. workers similarly employed. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Under 20 C.F.R. §656.21(j)(1), an employer must prepare a recruitment report that explains with specificity the lawful job-related reasons for not hiring each U.S. worker interviewed.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. ***H.C. LaMarche Enterprises., Inc.,*** 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

It is well settled that an employer may reject an applicant who does not meet unchallenged job requirements. ***See Bronx Medical and Dental Clinic***, 90-INA-479 (Oct. 30, 1993) (***en banc***); ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994);***O. Thompson Co.,*** 91-INA-350 (May 26, 1993). Panels of the Board have also held that when an applicant fails to satisfy the minimum requirements, the burden shifts to the CO to prove that the applicant is qualified (in accordance with 20 C.F.R. § 656.24(b)(ii)). , ***See, e.g., Mindcraft Software, Inc.***, 90-INA-328 (Oct. 2, 1991); ***Houston Music Institute, Inc***., 90-INA-450 (Feb. 21, 1991). ***See also Unisys***, 87-INA-555 (April 6, 1988). Moreover, the plurality ***en banc*** opinion in ***Bronx Medical*** and panel decisions such as ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994) found U.S. applicants who did not satisfy specified job requirements to be properly rejected, notwithstanding the CO's assertion that the applicants were capable of performing the job. Further, an employer may require the top end of the experience range listed in the ***Dictionary of Occupational Titles*** ("D.O.T."). ***See Transgroup Services, Inc***., 88-INA-428 (Feb. 21, 1990); ***A-Transmission Discount***, 88-INA-118 (March 27, 1990).

Here, U.S. applicant Patterson lacked the four years of experience as a mechanic specified by the Employer on the application, which requirement falls within the upper bound of the D.O.T. specifications. Thus, this case is distinguishable from the case cited by the CO, ***Culver City Nissan***, 90-INA-47 (Oct. 23, 1990), wherein the applicant possessed more than the three years of experience as a mechanic specified by the employer. The CO's assertion in the instant case that the applicant's experience for about three years some 15 years ago as the Owner/Operator of a service station, a job which only partly involved automotive repair, somehow qualifies him today to act as a mechanic performing such job duties as engine replacement is based on the CO's conclusory assertion that "[h]is background is sufficient to have learned the techniques, acquired information, and developed the facility needed for average performance in a specific job-worker situation, namely auto mechanics." (AF 10). Thus, the CO has failed to satisfy his burden of proving that applicant Patterson is qualified. Accordingly, the CO's denial of certification should be reversed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the Certifying Officer is directed to grant labor certification.

For the Panel:

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Pamela L. Wood
Administrative Law Judge

Judge Richard E. Huddleston, dissenting:

Because I would find that U.S. applicant Donald Patterson was rejected for other than lawful, job-related reasons, I respectfully dissent.

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Generally, an employer unlawfully rejects a U.S. applicant who satisfies the minimum requirements specified on the ETA-750, and the advertisement for the position. See ***American Cafe,*** 90-INA-26 (Jan. 25, 1991); ***Cal-Tex Management Services,*** 88-INA-492 (Sept. 19, 1990). However, even where an applicant's resume fails to meet the minimum requirements, where that resume shows a broad range of experience, education, and training that raises a possibility that the applicant is qualified, the employer bears the burden of further investigating the applicant's credentials. ***Gorchev & Gorchev Graphic Design,*** 89-INA-118 (Nov. 29, 1990) (***en banc***); ***Ceylon Shipping, Inc.,*** 92-INA-322 (Aug. 30, 1993). In addition, § 656.24(b)(2)(ii) provides that the CO shall consider a U.S. worker able and qualified for the position, if by any combination of education, training, and experience the worker is able to perform the duties involved in a normally accepted manner and as customarily performed by other U.S. workers similarly employed. Where the U.S. applicant does not meet the minimum requirement, the burden then shifts to the CO to explain why the applicant is qualified. ***Houston Music Institute, Inc.,*** 90-INA-450 (Feb. 21, 1991); ***Mindcraft Software, Inc.,*** 90-INA-328 (Oct. 2, 1991).

In this case, the minimum requirement cited by the Employer was four years of experience as an auto mechanic (AF 23). U.S. applicant Donald Patterson listed on his resume that he was the Owner/Operator of a Union Service Station along with his spouse from 1977-80, and that his duties were "[d]iagnosis, maintenance, and repair of all types of automotive, truck and marine equipment" and the "[s]upervision of six employees" (AF 49). All of Mr. Patterson's work experience since 1980 involved employment as a machinist (AF 48-49), and after interviewing the applicant, the Employer rejected him because although he was an experienced machinist, he had insufficient and outdated experience as an auto mechanic (AF 13). In the NOF, the CO found the experience requirement for an auto mechanic in the ***Dictionary of Occupational Titles*** is two to four years, Mr. Patterson has sufficient education, training, and experience to perform the core duties of the position, he could perform all duties within a reasonable period of on-the-job training, and the Employer had therefore rejected him for other than lawful, job-related reasons. (AF 20-21).

I would find that the CO has carried his burden by showing Mr. Patterson has sufficient education, training, and experience to perform the core duties of the position, based on the

requirements in the D.O.T., and the applicant's experience as the Owner/Operator of a Union Service Station. See ***Culver City Nissan,*** 90-INA-47 (Oct. 23, 1990); ***Unisys (formerly Sperry, Inc.),*** 87-INA-555 (Apr. 6, 1988). The Employer's rebuttal rejecting Mr. Patterson's experience is cursory, and somewhat inconsistent, as it states that Mr. Patterson's exposure to auto mechanics was "incidental," when Mr. Patterson's resume includes automotive mechanics training from both the Chrysler and Toyota Motor Corporations (AF 13, 49). Moreover, even though his automotive knowledge may be somewhat dated, his extensive training as a machinist and background in auto mechanics would indicate Mr. Patterson could do the job with a reasonable period of on-the-job training. See ***Anderson-Mraz Design,*** 90-INA-142 (May 30, 1991); ***Taam Shabbos,*** 90-INA-87 (May 20, 1991).

In the Request for Review, the Employer states that Mr. Patterson never wanted the position of auto mechanic, only wanted a position of machinist, was referred to another employer, was hired as a machinist, and is now working as an inspector (AF 2). Even considering this information submitted beyond the rebuttal deadline, the Employer's rejection of Mr. Patterson would still be unlawful because the Employer never contends or submits any documentation that it offered the job to Mr. Patterson, or that Mr. Patterson rejected the position or was not interested in the position. See ***United Cerebral Palsy of the Island Empire, Inc.,*** 90-INA-527 (Aug. 19, 1992); ***Composite Research, Inc.,*** 91-INA-177 (Oct. 1, 1992).

Based on the foregoing, I would find that U.S. applicant Donald Patterson was rejected for other than lawful, job-related reasons, and the CO's denial of labor certification was, therefore, proper.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.